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No. ——

IN THE

Supreme Court of the United States

JAMES R. RANDALL
and
ARCHER-DANIELS-MIDLAND COMPANY,
Petitioners,
v.
DELLWOOD FARMS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the restrictions on disclosure of lawful interceptions imposed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 inapplicable when a government informant or cooperating witness secretly makes recordings of his conversations, with the result that any private civil litigant can subpoena such recordings from the prosecutor's files?

2. When one party to a face-to-face conversation records it or consents to its being recorded, does that mean the conversation is not an "oral communication" subject to the protections of Title III, without regard to whether the circumstances of the conversation made it reasonable for the other party to expect that it would not be recorded?

LIST OF PARTIES

Petitioner James R. Randall was an intervenor in the District Court and an appellant and cross-appellee in the Court of Appeals. Petitioner Archer-Daniels-Midland Company was a defendant in the District Court and appellant, cross-appellant, and appellee in the Court of Appeals. Respondents, who were plaintiffs in the District Court and appellants, cross-appellants, and appellees in the Court of Appeals, were A & W Bottling, Inc., Carteret Packaging, Inc., Dellwood Farms, Inc., E.B. Evans Food Company, Inc., Golden Eagle, Inc., Grist Mill Company, Mohawk Distilled Products, Inc., Pepsi-Cola Bottling Company of Olean, Publix Super Markets, Inc., Rite Foods, Inc., Seven Up Bottling Company of Jasper, Southeastern Specialty Foods Corp., Sun-Dew Sales Corp., Tom's Foods, Inc., Tuscan Dairy Farms, Inc., Vineland Syrup, Inc., Vita Food Products, Inc., Wells Dairy, Inc., a/k/a Wells Blue Bunny Dairy, Inc., Zarda Enterprises, and Gray & Company. Also defendants in the District Court were A.E. Staley Manufacturing Company, American Maize Products Company, and Cargill Incorporated.

LIST PURSUANT TO RULE 29.6

Respondent Archer-Daniels-Midland Company is a publicly held corporation. It has no parent companies.

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Petitioners James R. Randall and Archer-Daniels-Midland Company ("ADM") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 19, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 216 F.3d 621 and is reproduced at A. 1a. [1] The amended order of the District Court is reported at 46 F. Supp. 2d 819 and is reproduced at A. 37a.

JURISDICTION

The orders of the District Court were entered on March 25, 1999 and April 27, 1999. The judgment of the Court of Appeals was entered on June 19, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, § 2510(2) provides:

> "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

Title 18, § 2511(2)(c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the

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[1] "A." denotes the appendix to this Petition. "P.S.A." denotes Plaintiffs' Separate Appendix in the Court of Appeals, "D.S.A." the Separate Appendix filed by Randall and ADM in the Court of Appeals, and "DX" an exhibit to ADM's motion to quash in the District Court.

communication has given prior consent to such interception.

Title 18, § 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Title 18, § 2517(3) provides:

> Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 211, codified as amended at 18 U.S.C. §§ 2510-2520, is set forth in full in the Appendix at A. 65a–105a.

STATEMENT

A. Whitacre's Taping.

Until August 1995 Mark Whitacre was Vice President of ADM and President of its BioProducts division. A. 37a. Beginning at least as early as 1991, Whitacre used a series of falsified invoices to defraud ADM of nearly $9 million, most of which eventually was traced to overseas accounts that he

controlled. DX 6.[2] In November 1992, "to deflect the FBI's suspicions" about his own conduct, A. 2a, Whitacre asserted to the FBI that ADM was involved in price-fixing in the market for lysine (an amino acid used to stimulate animal growth), DX 8 at 2814-16, and suggested to the FBI that he tape conversations and meetings in order to gather evidence of such involvement. A. 2a; DX 8 at 2963, 3295-96.

The FBI not only accepted Whitacre's offer, A. 2a, but, as a federal judge later found, "gave Whitacre the discretion to decide which conversations to tape." *United States v. Andreas*, 1998-1 Trade Cases (CCH) ¶ 72,129 at 81,837, 1998 WL 214666, at *5 (N.D. Ill. Apr. 22, 1998), *aff'd*, 216 F.3d 645 (7th Cir. 2000). Over a two-and-one-half-year period, Whitacre "recorded or consented to the recording of hundreds of hours of his conversations with other ADM personnel and third parties." A. 37a.

One of the ADM employees Whitacre secretly taped was petitioner Randall, who was then President of ADM. As the Court of Appeals noted, Randall was not involved in price-fixing. A. 2a.

B. The Private Civil Actions Involving High Fructose Corn Syrup.

In 1995 the Federal Government commenced grand jury investigations concerning the conduct of ADM and other companies in the markets for lysine, citric acid, and high fructose corn syrup (HFCS). *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997). In 1996 ADM pleaded guilty to antitrust charges involving the lysine and citric acid markets, and Whitacre and two other former

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[2] Whitacre's frauds were later discovered, and he pled guilty to 37 federal felony counts relating to those frauds. DX 6-7. He was sentenced to nine years in prison and ordered to pay ADM more than $11 million in restitution. DX 7.

ADM officials (Michael Andreas and Terrance Wilson) were later tried and convicted on antitrust charges involving the lysine market.[3]

In 1998 the federal grand jury investigation of the HFCS market ended without charges being brought against anyone. D.S.A. 78. In 1995, however, after the commencement of a grand jury investigation concerning HFCS had been reported in the press, several law firms specializing in plaintiffs' class actions filed antitrust actions against ADM and other manufacturers of HFCS. The actions were brought on behalf of companies that had purchased HFCS from ADM or one of the other defendants. The Judicial Panel on Multidistrict Litigation transferred all federal actions involving HFCS to the United States District Court for the Central District of Illinois for consolidated or coordinated pretrial proceedings before Judge Michael M. Mihm. The actions before Judge Mihm, in which the subpoena at issue here was served, include a class action, which itself is a consolidation of several separate class actions, and an individual action by respondent Gray & Company, a purchaser of HFCS and corn syrup.

C. Plaintiffs' Subpoena.

As the Court of Appeals explained, "Some of the [Whitacre] recordings were used in the criminal proceedings" against Andreas, Wilson, and Whitacre, "but many were not . . . ." A. 2a. In November 1998 the respondents who are class plaintiffs, who already had obtained access to all recorded conversations that were played in court during the criminal proceedings and certain other recordings they had obtained by subpoena in 1997, subpoenaed the remainder of

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[3] Whitacre was charged despite his taping because the Government determined that his defrauding of ADM had violated his cooperation agreement.

the Whitacre tapes from the Department of Justice ("DOJ"). *Id.* The subpoena covered nearly 200 tapes. A. 63a. Respondents sought all portions of all the tapes without regard to subject matter. P.S.A. 18, 24.

As the Court of Appeals noted, petitioner Randall, though not involved in any antitrust violations, "fears that some of the recordings contain embarrassing statements by him on unrelated matters." A. 2a. Randall and petitioner ADM moved to quash the subpoena, arguing, *inter alia*, that even if the taping was lawful under the provisions of Title III permitting certain one-party consent recordings, Title III barred DOJ from disclosing the recordings for use in private civil litigation.[4] During the hearing on the motions, counsel for DOJ stated that "[t]here may be excerpts on the tapes that deal with personal conversations or things like that." D.S.A. 76. Counsel for respondents acknowledged that "there are excerpts on the tapes that would not be relevant." *Id.*

D. The District Court's Decision.

1. Tapes of Telephone Conversations.

The District Court quashed the subpoena insofar as it sought tapes of telephone conversations. A. 62a. The court first held that the restrictions on disclosure imposed by Title III apply to one-party-consent interceptions as well as court-authorized interceptions:

> [T]he phrase "intercepted in accordance with the provisions of this chapter" in § 2517(3) clearly contemplates interceptions of consensual recordings made in accordance with § 2511(2)(c) or (2)(d). In other words, consensual recordings that are made under color of law or without a criminal or tortious purpose are recordings made "in accordance with" Title III. Accordingly, the Court holds that § 2517(3) controls the

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[4] Randall was allowed to intervene to oppose disclosure of the tapes. A. 45a.

disclosure of the recordings of wire communications made by Whitacre.

A. 55a. The court then ruled that § 2517(3), which allows disclosure of intercepted communications "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof," permits disclosure of lawfully made recordings to private civil litigants. A. 56a-58a. But the court nevertheless quashed respondents' pretrial discovery subpoena insofar as it covered tapes of telephone conversations, because the subpoena did not seek a disclosure of the tapes "while giving testimony under oath or affirmation," as required by § 2517(3). A. 59a-60a.[5]

2. Tapes of Face-to-Face Conversations.

In contrast, the District Court ruled that respondents could obtain in their entirety (subject to a protective order but with no prior review by the court or a special master) all recordings of face-to-face conversations. A. 60a-61a. Those conversations, the court held, were not "oral communications" under 18 U.S.C. § 2510(2). The court acknowledged that "those people recorded by Whitacre may have had a subjective expectation that their conversations would be kept private (based on location and also the fact that ADM officials, to include Whitacre, had signed nondisclosure agreements)." A. 49a. In light of the express inclusion of "oral communications" in the provisions of Title III permitting some but not all one-party consent recordings (18 U.S.C. § 2511(2)(c) and (2)(d)), the court also acknowledged that "it appears that Congress contemplated that some

[5] Respondents' subpoena called for production of nearly 200 tapes at a discovery deposition. A. 63a. Respondents checked the testimony box as well as the documents or objects box on the subpoena form, but the only deponent respondents identified was a "Custodian of Documents" to be designated by DOJ under Rule 30(b)(6). P.S.A. 18.

face to face, consensual recordings would involve a reasonable expectation of privacy on the part of the person or persons who were unaware that they were being recorded." A. 51a. But the court held that the face-to-face conversations recorded by Whitacre were not "oral communications" because Fourth Amendment precedent established that any expectation of privacy on the part of Randall and others recorded by Whitacre "was not a reasonable expectation." A. 49a (citing *Hoffa v. United States*, 385 U.S. 293 (1966), and *United States v. White*, 401 U.S. 745 (1971)).

"[T]he Fourth Amendment," the District Court stressed, "does not give an alleged wrongdoer protection against a trusted accomplice tape recording or divulging the contents of conversations." A. 51a. Reasoning that "the definition of 'oral communication' [in § 2510(2)] parallels the Fourth Amendment reasonable expectation of privacy test established [in] *Katz* [*v. United States*, 389 U.S. 347 (1967)]," the court interpreted that statutory definition to incorporate the Fourth Amendment principle that one-party-consent recordings do not invade a constitutionally justifiable expectation of privacy. A. 51a. On that basis, the court held Title III wholly inapplicable to Whitacre's tapes of face-to-face conversations with Randall and others.

Noting "the gravity of the issues involved," the District Court raised *sua sponte* the appropriateness of an interlocutory appeal. Tr. of March 22, 1999 at 89. After Randall, ADM, and plaintiffs all moved for certification under 28 U.S.C. § 1292(b), the District Court certified its order under that provision. A. 62a. It ruled that there were controlling questions of law as to, *inter alia*, (i) the applicability of Title III's restrictions on disclosure to one-party-consent recordings, and (ii) whether a one-party-consent recording of a face-to-face conversation can constitute an "oral communication" under the statute. A. 62a-63a. Randall,

ADM, and plaintiffs all petitioned the Court of Appeals to grant them permission to appeal under § 1292(b), which it did.

E. The Court of Appeals' Decision.

On February 9, 2000, the Court of Appeals ruled that plaintiffs were entitled to all the tapes. A. 1a-10a. In an opinion by Chief Judge Posner, the court broadly held that Title III imposes no limitations on disclosure of lawful one-party-consent recordings:

> If by virtue of sections 2511(2)(c) or (d) an interception is not prohibited by Title III, there are *no* restrictions on its use.

A. 6a (emphasis in original). The court declared that when a person lawfully records a conversation to which he is a party, Title III does not "regulate its use in any way." A. 8a. *See also* A. 7a ("if, as in the case of most interceptions of communications by or with the consent of a party, the interception does not require a warrant to be lawful, Title III does not restrict its use").

The court went to hold that Whitacre's taping was lawful under § 2511(2)(c), the provision of Title III allowing one-party-consent interceptions by a person acting under color of law. A. 8a-9a. Applying its earlier holding that Title III does not limit disclosure of lawful one-party-consent interceptions, the court concluded that plaintiffs were entitled to all the tapes. A. 10a.

In interpreting Title III to place no restrictions on disclosure of lawful one-party-consent recordings, the Court of Appeals never once mentioned the phrase in § 2517(3) reading "intercepted in accordance with the provisions of this chapter." Whereas the District Court had emphasized that that phrase clearly encompasses lawful one-party-consent recordings, thus making such recordings subject to the

restrictions on disclosure in § 2517(3), A. 55a, the Court of Appeals instead relied upon the structure of Title III and the location of § 2517(3) within the statute. A. 6a-7a.

The court also stressed that

> To subject interceptions made lawful by sections 2511(2)(c) and (d) to section 2517(3) would have absurd consequences. It would mean that Whitacre had violated the statute by turning his recordings over to the FBI, since on the district court's reading of that section the only permissible disclosure of the contents of an interception made *lawful* by sections 2511(2)(c) or (d) is to play a tape of, or testify to, those contents *in court*.

A. 8a (emphasis in original).

Although the Court of Appeals' broad holding concerning § 2517(3) made it unnecessary for the court to rule on any other issue, the court stated that "[t]he district judge was following the law of this circuit in holding that in defining 'oral communications' by reference to a justifiable expectation that they would not be intercepted, Congress had limited the protection of the statute to situations in which the interception would violate the Fourth Amendment if done by the government. *In re John Doe Trader Number One*, 894 F.2d 240 (7th Cir. 1990)." A. 4a (additional citations omitted).[6]

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[6] The Court of Appeals said its decision was without prejudice to the District Court's considering whether to impose a protective order. A. 10a. The District Court, however, had already considered the procedures that would apply to tapes produced by DOJ, when it had ordered production of the tapes of face-to-face conversations. The court had ordered the tapes produced subject to a protective order previously applied to certain other material in the case, but had refused to appoint a special master to screen the tapes before production. A. 60a-62a.

REASONS FOR GRANTING THE WRIT

This case presents two important questions concerning the scope of the protection for privacy afforded by Title III.

First, the Seventh Circuit has held that Title III's restrictions on disclosure place no limits on the government's disclosure of one-party-consent recordings made under color of law. Given the extraordinary amount of one-party-consent taping that occurs in federal, state, and local criminal investigations, the Court of Appeals' holding opens up to discovery in private civil lawsuits a vast quantity of material in prosecutors' files—material whose disclosure may invade the privacy of persons never involved in any criminal conduct. Review is necessary because the decision below has potentially far-reaching consequences: under the Seventh Circuit's holding, comments in private conversations about the most intimate or embarrassing matters would now become subject to disclosure to private civil litigants conducting discovery. In the present case, the Court of Appeals' interpretation of the statute has led the court to rule that plaintiffs in a civil case may obtain, in their entirety, nearly 200 secretly-made recordings, without regard to what portions of the recordings are relevant to the plaintiffs' claims.

Congress cannot have intended such a result. Title III's restrictions on disclosure apply to "any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter." 18 U.S.C. § 2517(3). An interception rendered lawful by the provision of Title III permitting one-party-consent interceptions under color of law is an "intercept[ion] in accordance with the provisions of this chapter." Moreover, an overriding purpose of the statute was to protect privacy. *See Gelbard v. United States*, 408 U.S. 41, 48 (1972). While the statute was certainly also intended to facilitate the investigation and prosecution of crime, it was not intended to provide fodder for private civil litigants.

Second, although the Court of Appeals' broad ruling on the first question was dispositive in this case, its opinion addressed another question as well, which is also of great importance: whether one party's consent to the recording of a face-to-face conversation, by itself, removes that conversation from the protection of Title III. The Court of Appeals made clear that under Seventh Circuit law such consent alone renders the statute inapplicable. That view is contrary to the law in several other circuits and is at odds with the text, purposes, and background of Title III.

I. TITLE III WAS NOT INTENDED TO GIVE PRIVATE CIVIL LITIGANTS ACCESS TO TAPES SECRETLY MADE FOR THE GOVERNMENT BY INFORMANTS, COOPERATING WITNESSES, AND UNDERCOVER AGENTS.

A. The Court of Appeals' Interpretation of § 2517(3) Is Contrary to Its Plain Language and Inconsistent with Congress's Intent To Protect Privacy.

1. Section 2517(3) provides that a person who has received "by any means authorized by this chapter" information concerning a communication that was "*intercepted in accordance with the provisions of this chapter*" may disclose the contents of that communication "while giving testimony." (Emphasis added). The plain language of that provision, which was not discussed by the Court of Appeals, covers lawful one-party-consent recordings by informants and others who tape conversations at the government's behest.

The first word of the key statutory phrase is "intercepted." Title III broadly defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). That definition plainly encompasses a one-party-consent recording. The

choice of a broad definition of "intercept" covering one-party-consent recordings was no accident, for other bills that Congress did not approve would have defined "intercept" to exclude such recordings.[7]

A one-party-consent recording under color of law is also "in accordance with the provisions of this chapter." One of the exceptions provided in 18 U.S.C. § 2511, to the general prohibition in 18 U.S.C. § 2511(1)(a) against interception of a wire, oral, or electronic communication, provides that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). As Judge Edward Becker explained in *United States v. Cianfrani*, 448 F. Supp. 1102 (E.D. Pa.), *rev'd on other grounds*, 573 F.2d 835 (3d Cir. 1978), the language of § 2517(3), "authorizing disclosure in any case where the interception was in accordance with the provisions of the chapter, should be read to include interceptions by consent since such interceptions are in accordance with § 2511(2)(c), one of the provisions of the chapter." 448 F. Supp. at 1122.

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[7] *See Anti-Crime Program: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong. 886, 905, 1043 (1967); *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. 78, 1002 (1967). In testimony before Congress in 1984, Deputy Assistant Attorney General Toensing, noting that "[t]he term 'intercept' is defined in Title III (18 U.S.C. § 2510(4)) as 'the aural acquisition of the contents of any wire or oral communication . . . ,'" explained that "the above definition is so broad that it applies to any recording of a wire or oral conversation including one to which the person making the recording is a party." *Taping Wire or Oral Communications: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong. 19 (1984).

Title 18, § 2511(1)(e)(i) confirms that Congress views lawful one-party-consent recordings as in accordance with the chapter, rather than simply outside the statute altogether. Section 2511(1)(e)(i) uses the term "authorized" in the context of § 2511(2)(c), one of the one-party-consent provisions. The pertinent phrase of § 2511(1)(e)(i) reads: "intercepted by means authorized by sections . . . 2511(2)(b) *to (c)*." (Emphasis added). This treatment of § 2511(2)(c) demonstrates that the Court of Appeals erred in concluding that one-party-consent interceptions under color of law are exempt from Title III, rather than authorized by it. A. 7a.

Had Congress intended § 2517(3) to apply only to interceptions made pursuant to court order, it easily could have included that limitation, as it did elsewhere in the statute. *See, e.g.*, 18 U.S.C. § 2518(12) (referring to an "interception of a communication under an order"). But Congress instead chose the broad phrase, "intercepted in accordance with the provisions of this chapter." The choice of that language demonstrates that § 2517(3) was not intended to be limited to court-authorized interceptions.

The purposes of the statute confirm that the Court of Appeals erred in reading the phrase "intercepted in accordance with the provisions of this chapter" out of § 2517(3). Congress declared that Title III was intended "to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce." Pub. L. No. 90-351, tit. III, § 801(b), 82 Stat. 197, 211 (1968). "[T]he protection of privacy was an overriding congressional concern" in the enactment of Title III. *Gelbard*, 408 U.S. at 48. As Judge Becker noted in *Cianfrani*, the congressional goal of protecting privacy

> implicates a question quite distinct from that of acquisition; that is, disclosure. To include in Title III

> with its extensive privacy protections only judicially authorized interceptions under § 2516 would appear to have been subversive of this . . . privacy purpose.
>
> . . . the privacy invasions resulting from interception of consensually monitored conversations may in fact exceed those resulting from judicially authorized interceptions.

448 F. Supp. at 1121.

Of course, Title III was also intended to facilitate the investigation and prosecution of crime by identifying the conditions under which communications may be intercepted. *See* S. Rep. No. 90-1097, at 66 (1968). Thus, as originally enacted in 1968, § 2517(3) allowed disclosure of communications interpreted in accordance with the statute only while giving testimony in a "criminal proceeding" or a "grand jury proceeding." 82 Stat. at 217. Two years later, when Congress enacted the Racketeer Influenced and Corrupt Organizations statute, which included broad civil remedies, in the very next section of the legislation Congress amended § 2517(3) to eliminate the restriction to criminal and grand jury proceedings, and to permit disclosure of communications intercepted in accordance with Title III "in any proceeding held under the authority of the United States or of any State or political subdivision thereof."[8] Otherwise communications intercepted under Title III could not have been used in pursuing the new civil remedies Congress was creating.

Although Congress thus clearly contemplated use of communications intercepted under Title III in some civil cases, "turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations are overheard." *NBC v. United States Dep't of Justice*, 735 F.2d 51, 54 (2d Cir. 1984) (holding that

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[8] *See* Organized Crime Control Act of 1970, tit. IX, §§ 901-902, Pub. L. No. 91-452, 84 Stat. 922, 941-47 (1970).

defendant in libel action could not subpoena recordings made pursuant to court authorization in federal criminal investigation). Congress "'envisioned the gatherer of such evidence, *i.e.*, a law enforcement or governmental investigative agency, to be the party making use of the evidence in a civil case.'" *In re Motion To Unseal Elec. Surveillance Evidence*, 990 F.2d 1015, 1019 (8th Cir. 1993) (en banc) (quoting district court opinion) (holding that § 2517(3) does not authorize disclosure of fruits of court-authorized interceptions to private civil litigants, even those suing under RICO).

Congress's concern was not limited to wiretapping and other forms of third-party interceptions. As originally reported by the Senate Judiciary Committee, the bill that became Title III permitted all one-party-consent interceptions:

> It shall not be unlawful under this chapter for a party to any wire or oral communication, or a person given prior authority by a party to the communication to intercept such communication.

S. Rep. No. 90-1097, at 12. But in a statement submitted with the Committee Report, Senator Philip Hart of Michigan sharply criticized this provision, declaring that "the risk created by electronic recording is of an entirely different order from the risk of repetition involved in normal conversations, and that consensual electronic surveillance presents grave dangers to free and open expression in our society." *Id.* at 175. During the consideration of the bill by the full Senate, Senator Hart and Senator McClellan, the manager of the bill, reached agreement on an amendment to address one-party-consent recordings. Except for minor changes made in later years, that amendment contained the one-party-consent provisions now codified in 18 U.S.C. § 2511(2)(c) and (2)(d).

Senator Hart explained the amendment as follows:

> [T]he able manager of the bill and his staff and those associated with me have spent considerable time trying to respond to an enormously sensitive problem. The bill as we reported it out of the committee leaves a gaping hole, which would permit surreptitious monitoring of a conversation by one of the parties to the conversation without the consent of the other. It leaves wide open the problem of industrial espionage and many other abuses of the right of privacy.
>
> In the substitute that is now pending we propose to prohibit a one-party consent tap, except for law enforcement officials, and for private persons who act in a defensive fashion. In other words, whenever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of title III and will also be subject to a civil suit. Such one-party consent is also prohibited when the party acts in any way with an intent to injure the other party to the conversation in any other way. For example the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortions or other unlawful or injurious uses by the other party.
>
> I think the substitute does respond to a problem that is of very great concern to this country; and in the years ahead, as these techniques become more sophisticated still, will become of increasing concern. Let me say in conclusion that the amendment does not in any way limit consensual recording by law enforcement officers or by

> private persons acting in conjunction with law enforcement officers.

114 Cong. Rec. 14,694-95 (1968). It is apparent from these remarks and the subsequent approval of Senator Hart's amendment that Congress intended the statute to address one-party-consent interceptions and not simply leave such interceptions unregulated.

2. The Court of Appeals' holding is contrary to numerous decisions recognizing that one-party-consent interceptions under color of law are "interceptions in accordance with the provisions of this chapter." For example, in *Forsyth v. Barr*, 19 F.3d 1527 (5th Cir. 1994), the Fifth Circuit concluded that lawful one-party-consent interception are "interceptions made in accordance with" Title III. *Id.* at 1544 (referring to "the contents of interceptions made in accordance with the Act, such as through a judicially-approved wiretap or by consent under certain circumstances"). In *United States v. Armocida*, 515 F.2d 49 (3d Cir. 1975), the Third Circuit held that a telephone conversation taped with a government agent's consent was admissible because "§§ 2511(2)(c) and 2517(3), taken together, specifically authorize the admission into evidence of warrantless recordings of this type." *Id.* at 52. *Accord United States v. Little*, 753 F.2d 1420, 1435 (9th Cir. 1984); *United States v. Bishton*, 463 F.2d 887, 892 (D.C. Cir. 1972).

3. The Court of Appeals' reliance upon the structure of Title III, as a basis for reading "intercepted in accordance with the provisions of this chapter" as if it said "intercepted pursuant to court authorization," was misplaced. The Court of Appeals suggested that the provisions surrounding § 2517, *i.e.*, §§ 2516, 2518, and 2519, deal only with court-authorized interceptions. A. 7a. That is incorrect. Section 2518(10)(a) sets forth procedures governing motions to suppress "the contents of wire or oral communications intercepted pursuant to this chapter" on the grounds, *inter alia*, that "the

communication was unlawfully intercepted." That provision applies to one-party-consent interceptions as well as interceptions pursuant to court order. *See, e.g., United States v. Vest*, 813 F.2d 477, 482 (1st Cir. 1987); *Anthony v. United States*, 667 F.2d 877, 878 (10th Cir. 1981); *United States v. Phillips*, 540 F.2d 319, 325 (8th Cir. 1976).

The Court of Appeals also reasoned that interpreting § 2517(3) to apply to interceptions under color of law (and therefore lawful under § 2511(2)(c)) "would have absurd consequences," because then Whitacre would have violated the statute by turning his tapes over to the FBI. A. 8a. This reasoning is doubly flawed. First, it is implicit in § 2511(2)(c) that a person who makes a recording while acting under color of law may provide it to the government. Second, § 2517 is directed, not to anyone in possession of a recording, but to government officers and those to whom they have made authorized disclosures of recordings. That is apparent from its text, *see* A. 89a-90a, and from its title, "*Authorization* for disclosure and use of intercepted wire, oral, or electronic communications." (Emphasis added). Private citizens do not need authorization to disclose a tape; they may make any disclosure that is not affirmatively prohibited by Title III.[9]

B. The Court of Appeals' Decision Would Permit Unwarranted Invasions of Privacy.

The Court of Appeals' ruling that Title III's restrictions on disclosure place no limits on the government's disclosure of one-party-consent recordings poses a grave threat to privacy and warrants review by this Court. The invasiveness of secret taping by informants, undercover agents, and others enlisted by law enforcement authorities to gather evidence has long

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[9] For the same reason, the civil cases cited by the Court of Appeals, A. 7a, which allow private parties to disclose lawfully made tapes, do not in any way support its holding about informant-made tapes in prosecutor's files.

been recognized, but until now it has generally been understood that the recordings made by such persons would be used only in the government investigations that prompted the taping, in any resulting grand jury proceedings or criminal trials, and in any related civil proceedings brought by the government. The Court of Appeals, however, has opened the files of prosecutors and police departments to private civil litigants.

As Judge Gerhard Gesell warned, the power to conduct secret one-party-consent taping "is an enormously dangerous and insidious power to place in the unsupervised hands of the public and the police." *United States v. Kline*, 366 F. Supp. 994, 996 (D.D.C. 1973). The danger would be dramatically increased by the decision below, which gives parties pursuing or defending civil lawsuits *carte blanche* to subpoena one-party-consent recordings from law enforcement authorities.

The Court of Appeals' decision has broad ramifications, because "'participant recording,' in which one participant in a conversation or meeting, either a police officer or a co-operating party, wears a concealed device that records the device or broadcasts it to others nearby . . . is used tens of thousands of times each year throughout the country." Alan F. Westin, PRIVACY AND FREEDOM 131 (1967). In recent years, it has not been unusual for law enforcement authorities to encourage or direct persons willing to do so to surreptitiously record conversations over a period of months or even years. In this case, Whitacre secretly taped his colleagues over a two-and-one-half-year period. A. 37a. *See also, e.g., Obron Atl. Corp. v. Barr*, 990 F.2d 861, 863-64 (6th Cir. 1993) (corporate executive taped conversations with officers and competitors of the corporation over two-year period); James Tuohy and Rob Warden, GREYLORD 60-64, 71-74 (1989) (describing extensive one-party-consent taping by undercover agent Terrence Hake and Illinois Circuit Judge Brocton Lockwood). Plainly, such extensive one-party-consent taping can capture embarrassing remarks

on a wide range of subjects having nothing to do with criminal activity; and the persons making the remarks may not even have been under investigation, but may simply have had a conversation with the informant (or undercover agent) and a person who was under investigation.

Under the decision below, any civil litigant who learns that an opposing party was the subject of a criminal investigation—or simply had conversations with a person who was the subject of such an investigation—can subpoena the prosecutor's office to obtain any one-party-consent recordings made by an informant or undercover agent in the course of the investigation. In matrimonial litigation, for example, one party might hope to turn up a tape that could be used to discredit or embarrass the opposing party. It makes no difference whether anyone—let alone the opposing party in the civil case—was charged with or convicted of a crime. Under the Court of Appeals' decision, no one whose words were captured on one-party-consent recordings made under color of law in the course of a criminal investigation would have any basis under Title III to object to the subpoena, because the Court of Appeals read the restrictions in § 2517(3) to be wholly inapplicable to such recordings.

Although the Court of Appeals referred to Fourth Amendment law to support its holding, A. 8a, Congress did not accept, for purposes of Title III, that a party's consent to taping ends all concern about privacy. *See* pp. 15-17, *supra*. Moreover, when Title III was enacted in 1968, it was uncertain whether this Court would uphold one-party-consent interceptions against Fourth Amendment challenge in light of *Katz*.[10] It was only by the narrowest of margins that this

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[10] Although there were contrary rulings, one federal court already had held such interceptions impermissible under *Katz*, and two more courts would so hold within the next seven months. *See Doty v. United States*, 416 F.2d 887, 892 (10th Cir. 1968), *withdrawn on rehearing*, *id.* at 893-94 (1969), *vacated sub nom. Epps v. United States*, 401 U.S. 1006 (1971);

Court later held one-party-consent interceptions by informants to be permissible under the Fourth Amendment standard of *Katz v. United States*, 389 U.S. 347 (1967). When such interceptions were considered in *United States v. White*, 401 U.S. 745 (1971), the eight Justices who interpreted the Fourth Amendment to apply to electronic interceptions were evenly divided.[11] Justice Black adhered to his view that electronic interceptions are outside the scope of the Fourth Amendment. *See id.* at 754 (Black, J., concurring).

Justice Harlan's dissent in *White*, one of his last dissents on the Court, eloquently described the risks posed when a party to a conversation secretly intercepts it or allows the police to do so:

> Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will

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United States v. White, 405 F.2d 838, 847-48 (7th Cir. 1969) (en banc), *rev'd*, 401 U.S. 745 (1971); *United States v. Jones*, 292 F. Supp. 1001, 1007-08 (D.D.C. 1968), *rev'd*, 433 F.2d 1176 (D.C. Cir. 1970). In 1971 such interceptions were held constitutionally permissible in *White* by a closely divided Court with no majority opinion, but that outcome was far from obvious in 1968. The uncertainty that existed prior to *White* is reflected in the fact that Justice Harlan, who had written a pre-*Katz* opinion (*Lopez v. United States*, 373 U.S. 427 (1963)) upholding a one-party-consent recording against Fourth Amendment challenge, dissented in *White*. 401 U.S. at 768.

[11] Because *White* involved a recording made prior to Title III, the statute was not applicable.

> either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

Id. at 787-89 (footnotes omitted).

The conclusion reached by the plurality in *White*, that an informant's secret interception of a conversation in which he participated "do[es] not invade the defendant's constitutionally justifiable expectations of privacy," *id.* at 751, has been accepted in later cases, and we do not suggest that the Court revisit it. But that this close question of Fourth Amendment law has been resolved in favor of allowing informant taping *in aid of law enforcement* should not obscure the real threat to privacy posed by such taping. That threat would be greatly exacerbated by opening prosecutor's files to attorneys for private civil litigants pursuing discovery within the extremely broad parameters established by modern discovery rules. Such attorneys would be eager to unearth embarrassing material (whether for actual use in court or to extort a settlement), and their single-minded pursuit of successful results in their lawsuits would not be mitigated to any significant degree by any concern about the privacy of innocent persons whose comments were captured on tape. There are compelling reasons as a matter of policy—and as a matter of statutory interpretation under Title III—to strike the balance differently as to disclosure of informant tapes to private civil litigants than as to use in criminal proceedings and civil proceedings brought by the government.

II. ONE PARTY'S CONSENT TO THE TAPING OF A FACE-TO-FACE COMMUNICATION DOES NOT RENDER TITLE III INAPPLICABLE.

Because the Court of Appeals read an exception for one-party-consent recordings under color of law into § 2517(3), it

did not reach petitioners' challenge to the District Court's ruling that one-party-consent recordings of face-to-face conversations are not interceptions of "oral communications" under Title III. But the Court of Appeals made clear that the District Court "was following the law of this circuit in holding that in defining 'oral communications' by reference to a justifiable expectation that they would not be intercepted, Congress had limited the protection of the statute to situations in which the interception would violate the Fourth Amendment if done by the government." A. 4a (citing *In re John Doe Trader Number One*, 894 F.2d 240, 242-43 (7th Cir. 1990)). In short, it is the law in the Seventh Circuit that one-party-consent interceptions of face-to-face communications—the very conversations for which many people reserve discussion of the most sensitive matters—are beyond the purview of Title III. Because Seventh Circuit law on that subject is in conflict with the decisions of at least five other Circuits and is contrary to the language of the statute, the Court should grant certiorari on the oral-communications issue as well.

When it enacted Title III in 1968, Congress imposed a broad prohibition making it unlawful to intercept "any wire or oral communication," except as specifically provided. § 2511(1)(a), 82 Stat. at 213. The statute defined "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." § 2510(2), 82 Stat. at 212. Except for a proviso later added to clarify that electronic communications are not within the definition, § 2510(2) contains the same language today.

Five Circuits—the First, Fourth, Sixth, Eighth, and Ninth Circuits—reject the theory that, merely because one party to a conversation consents to its interception, the conversation is not an "oral communication."

In *Boddie v. ABC*, 731 F.2d 333 (6th Cir. 1984), the Sixth Circuit held that a reporter's presence at a face-to-face interview he secretly recorded did not negate the existence of an "oral communication":

> Defendants contend that the interview was not protected under the statute because Boddie had no expectation of privacy. The statute defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." . . . The record shows that Boddie was aware that she was speaking with reporters from ABC. But it remains an issue of fact for the jury whether Boddie had an expectation that the interview was not being recorded and whether that expectation was justified under the circumstances.

Id. at 338-39 (citations omitted). *Accord Stockler v. Garratt*, 893 F.2d 856, 858-60 (6th Cir. 1990). In its decision in this case, the Court of Appeals described *Boddie* as a case not "involving recording one's own conversations, as in this case," A. 4a, but that is incorrect.[12]

In *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976), the Eighth Circuit remanded for a finding as to the purpose for which a participant in a meeting surreptitiously taped the meeting, so that it could be determined whether the taping was outside the exception in 18 U.S.C. § 2511(2)(d) permitting certain one-party-consent interceptions not under color of law. *Id.* at 327. The court held that "[t]he effect of § 2511(2)(d) . . . is to prohibit any interception, use or

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[12] *See* 731 F.2d at 335 ("[D]efendants Rivera, Thompson and other investigators conducted an interview with plaintiff Boddie. Boddie consented to be interviewed by the journalists in her home, but when questioned, she refused to appear on camera. Unbeknown to Boddie, the journalists recorded the interview by using a hidden videotape camera and concealed microphones.").

disclosure of oral or wire communications by a person not acting under color of law where the purpose is to commit any criminal, tortious or injurious act." *Id.* at 325.

In *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987), *aff'g* 639 F. Supp. 899 (D. Mass. 1986) (Keeton, J.), the First Circuit affirmed the suppression of a recording of a face-to-face meeting, based on the district court's finding, after an evidentiary hearing, that the recording had been made for improper purposes and therefore was not permissible under § 2511(2)(d). Under Seventh Circuit law, there would have been no hearing and no suppression; the taper's presence at the meeting would have taken the taping beyond the scope of Title III because of the Seventh Circuit's interpretation of the term "oral communication."

Likewise, in *Brown v. ABC*, 704 F.2d 1296 (4th Cir. 1983), which involved a civil suit alleging a violation of Title III, the Fourth Circuit held that a jury would have to decide whether a recording of a face-to-face meeting was made for an impermissible purpose under § 2511(2)(d). *Id.* at 1305. Again, under Seventh Circuit law, the plaintiff would have been out of court simply because the recording was made by an ABC reporter present at the meeting.

And in *Sussman v. ABC*, 186 F.3d 1200 (9th Cir. 1999) (Kozinski, J.), the Ninth Circuit concluded that an ABC employee's secret taping of face-to-face conversations would have violated Title III if the tapes had been made for "an unlawful or tortious purpose." *Id.* at 1202. ABC prevailed only because "plaintiffs have produced no probative evidence that ABC had an illegal or tortious purpose when it made the tape." *Id.* at 1203.

This Court should resolve the split in the circuits on this recurring issue. In treating all one-party-consent interceptions of face-to-face communications as outside the scope of Title III, the Seventh Circuit has misread the statute.

The statutory definition of "oral communication" may have been meant to parallel the *Katz* standard, but it differs from that standard in one crucial respect. Whereas *Katz* focuses on the existence of an expectation of *privacy*,[13] § 2510(2) focuses on the existence of an expectation of *noninterception*. By its terms that provision requires that the person uttering the communication "exhibit[] an expectation that such communication is not subject to *interception* under circumstances justifying such expectation." (Emphasis added). *See Walker v. Darby*, 911 F.2d 1573, 1577-79 (11th Cir. 1990) (internal quotation marks omitted) (holding that "we do not need to determine whether Walker had a reasonable expectation of privacy," and that Title III "requires us to determine whether he had a subjective expectation that his conversations were free from interception, and whether that expectation was objectively reasonable").

The difference between an expectation of privacy and an expectation of noninterception, though insignificant for many purposes, is critically important as to one-party-consent recordings. This very distinction was rejected by the plurality in *White* for Fourth Amendment purposes, 401 U.S. at 751-52, but was a central premise of Senator Hart's view—which carried the day in 1968—that one-party-consent recordings had to be limited:

> Occasionally, it is said that the parties to a conversation rely on their trust of one another not to reveal confidences that are disclosed in the conversation, and that the risk that the confidences will later be repeated to other persons is essentially the same, whether the repetition is by memory or by electronic recording.

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[13] *See Katz*, 389 U.S. at 353 ("the privacy upon which [*Katz*] justifiably relied"); *id.* at 361 (Harlan, J., concurring) (there must be a subjective, and reasonable, "expectation of privacy").

> I believe, however, that the risk created by electronic recording is of an entirely different order from the risk of repetition involved in normal conversations . . . .

S. Rep. No. 90-1097, at 175. *See* also pp. 15-17, *supra*.

White holds that, when a wrongdoer talks to a person who is secretly working as a government agent, the recording of that conversation does not "invade the defendant's constitutionally justifiable expectations of privacy." 401 U.S. at 751 (plurality opinion). But that does not mean that, any time two people talk to each other, neither can have a justifiable expectation of noninterception. Depending upon such factors as location, how loudly they are speaking, and their relationship, they may very well have a reasonable expectation that their conversation will not be intercepted.

As to both oral and wire communications, Title III limits one-party-consent interceptions to those made by persons acting under color of law, or persons acting without color of law who do not intercept "for the purpose of committing any criminal or tortious act." As to all oral communications, the rule in the Seventh Circuit reads these limitations out of the statute. That rule treats one party's consent to the taping of a face-to-face conversation as rendering the statute inapplicable, contrary to Congress's intent to provide broad protection against secret taping for criminal or tortious purposes, and to permit law enforcement authorities to disclose only under the circumstances set forth in § 2517 one-party-consent tapes made under color of law that record persons reasonably expecting not to be recorded.

The rule prevailing in the Seventh Circuit has disturbing implications. For example, one citizen could seek to lead another into discussion of embarrassing topics and secretly record the conversation to set up blackmail. So long as the conversation occurred face to face, under Seventh Circuit law Title III would impose no obstacle. That is a patently

unreasonable interpretation of the statute, given Congress's clear intent to prohibit such taping. *See* p. 16, *supra*.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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